NO. 94-6187

Supreme Court, U.S.
FILED
1994
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

STEVEN KURT WITTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Respectfully submitted,

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Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Steven Kurt Witte, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), in the United States District Court for the Southern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
September 21, 1994

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
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QUESTION PRESENTED

Does a government prosecution and punishment for an offense violate the double jeopardy clause if it already was included in relevant conduct for sentencing under the federal sentencing guidelines in a different and final prosecution?

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PRAYER

The petitioner, Steven Kurt Witte, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued June 23, 1994.

OPINIONS BELOW

On June 23, 1994, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the district court's order dismissing the indictment in this case. United States v. Wittie, No. 93-2245. A copy of that opinion is attached as Appendix A. The case is officially reported at 25 F.3d 250 (5th Cir. 1994).

A copy of the district court's order dismissing the indictment is attached as Appendix B.

JURISDICTION

On June 23, 1994, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the order of the district court which dismissed the indictment in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution of the United States provides in part that --

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.

U. S. Const., amend. V.

Section 1B1.3(a)(2) of the United States Sentencing Guidelines (Relevant Conduct) provides in part that --

> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, [the offense level shall be determined on the basis of] all acts and omissions described . . . above that were part of the same course of conduct or common scheme or plan as the offense of conviction.

U.S.S.G. § 1B1.3(a)(2).

Section 5G1.3(b) of the United States Sentencing Guidelines provides in part that --

> If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(b).

STATEMENT OF THE CASE

Course of Proceedings

In March 1991, Steven Kurt Witte[1], the petitioner, together with Sam Richard Kelly, was indicted for conspiracy to possess with intent to distribute marijuana, and aiding and abetting a knowing attempt to possess marijuana. Mr. Witte pleaded guilty to the aiding and abetting charge and agreed to cooperate with the government in exchange for the government's promise to dismiss the conspiracy charge and to file a motion under U.S.S.G. § 5K1.1 if Mr. Witte were to provide substantial assistance. Mr. Witte's cooperation caused Mr. Kelly to plead guilty.

Over objection by both the government and Mr. Witte, the district court included over 500 kilograms of cocaine from a related but as yet uncharged offense as 'relevant conduct' to be considered with the 375 pounds of marijuana in establishing a base offense level. This raised the guideline imprisonment range from 63 to 78 months, to 292 to 365 months. The district court granted the government's § 5K1.1 motion and departed downward to a sentence of 144 months.

The government then indicted Mr. Witte and Tom Pokorny for conspiracy and aiding and abetting an attempt to import the cocaine which had been included as relevant conduct for the marijuana

---

[1] The interested parties to this case are the United States of America and Steven Kurt Witte. Although the court of appeals case is styled United States v. Wittie, the correct spelling of the petitioner's surname is Witte. United States v. Wittie, 25 F.3d 250, 252 n.1 (5th Cir. 1994).

conviction and sentence. Mr. Witte moved to dismiss the indictment because (1) he already had been punished for the cocaine offense and (2) the indictment breached the earlier plea agreement. The district court dismissed the indictment on the double jeopardy ground.

On the government's appeal, the United States Court of Appeals for the Fifth Circuit reversed, holding that the double jeopardy clause did not preclude the second prosecution and punishment even though the acts underlying the second prosecution had been fully taken into account as relevant conduct in the first prosecution. United States v. Wittie, 25 F.3d 250, 261 (5th Cir. 1994). The court noted that its decision was in conflict with opinions from the Second and Tenth Circuits. Id. at 255 n. 18.

STATEMENT OF FACTS

Offense Conduct

In August 1989, an undercover agent of the Drug Enforcement Administration (DEA), Roger Norman, began negotiations with Dennis Mason in Tucson, Arizona, to import marijuana from Mexico into the United States. The first discussions were fruitless but contact resumed in June 1990, in Houston, Texas, between Agent Norman, Mason, and two new players, Tom Pokorny and Steven Kurt Witte. Mason, Pokorny, and Witte proposed to import marijuana from Mexico and cocaine from Guatemala; Agent Norman's job was to fly the drugs into the United States.

In July 1990, the Mexican drug source told them that cocaine might be added to or substituted for the marijuana shipments depending upon space and availability. By August 1990, Agent Norman was told that 4,400 pounds of marijuana was in Mexico for shipment. When Agent Gordon received the coordinates for the landing strip in Mexico, he arranged for the Mexican authorities to raid the operation. On August 12, 1990, Mason was arrested with several other people. Instead of finding marijuana, the authorities seized 591 kilograms of cocaine. Agent Norman told Witte the next day that his pilot had been unable to land because Mexican police had shown up on the airstrip. Plans between Agent Norman and Witte were placed on hold.

Although Pokorny's whereabouts were unknown, Agent Norman contacted Witte in January 1991, to see whether Witte would purchase 1,000 pounds of marijuana with a $50,000 downpayment.

Agent Norman still had possession of Witte's horse trailer from the earlier plans; Witte asked that it be returned to be used as a load vehicle for the marijuana. Additionally, Witte offered to bring a motor home belonging to Sam Kelly in Denver, Colorado, as an additional load vehicle.

On February 7, 1991, although Witte could produce only $25,000 of the downpayment, Agent Norman agreed to deliver to him and to Kelly the 1,000 pounds of marijuana. Undercover officers loaded the marijuana into the vehicles, and when Witte and Kelly took possession, they were arrested.[2]

The Two Indictments

The government first indicted Witte and Kelly for the "sting" marijuana from February 1991, charging conspiracy and attempted possession of marijuana with intent to distribute. Witte pleaded guilty to the attempted possession charge, which carried a penalty range of 5 to 40 years, in exchange for his agreement to cooperate in the case and to provide truthful information about any other offense about which he might be questioned. The government promised to move for a downward departure under U.S.S.G. § 5K1.1 if Witte provided substantial assistance and to further recommend a three-year cap if he aided them in locating Pokorny. Witte did not help to locate Pokorny, but Kelly, as a result of Witte's cooperation, decided to plead guilty.

When the district court sentenced Witte, it not only took into

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[2] The parties stipulated to 375 pounds of marijuana in the plea agreement. 25 F.3d at 253 n. 2.

account the 375 pounds of marijuana from the February 1991 "sting," but it also added as relevant conduct the more than 500 kilograms of cocaine from the August 1990 Mexican seizure. Both Witte and the government argued unavailingly that the cocaine should not be considered. The addition of the cocaine boosted Witte's guideline imprisonment range from 63 to 78 months, to 292 to 365 months.

The district court granted the government's Section 5K1.1 motion and departed to a sentence of 144 months based on Witte's cooperation via-a-vis Kelly. This sentence was still greater than the sentence available had Witte been punished only for the marijuana. Witte failed to perfect an appeal from this sentence.

The government brought a second indictment against Witte and Pokorny for conspiracy and attempted importation of the August 1990 cocaine. This indictment, before a different district judge of the same court, was dismissed on Witte's motion claiming that it violated the prohibition against double jeopardy and breached the plea agreement in the first case. Witte principally claimed that inclusion of the cocaine as relevant conduct in the first case was punishment for the cocaine which precluded a subsequent prosecution for the cocaine. The Fifth Circuit reversed the order of the district court and directed the reinstatement of the indictment, holding, inter alia, that inclusion of the cocaine as relevant conduct, even if considered punishment under double jeopardy analysis, was nevertheless intended by Congress and authorized via U.S.S.G. § 5G1.3(b). United States v. Wittie, 25 F.3d 250, 257-61 (5th Cir. 1994).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution by the United States alleging violations of Sections 952, 960 and 963 of Title 21, United States Code.

REASONS FOR GRANTING THE WRIT

> The Court of Appeals for the Fifth Circuit has decided an important question of federal law -- whether conduct which has been fully accounted for as additional punishment under the relevant conduct provisions of the sentencing guidelines may be the subject of a second prosecution and punishment -- which directly and intolerably conflicts with decisions of the Second and Tenth Circuits holding that full inclusion of the acts as relevant conduct for sentencing in one prosecution precludes a subsequent prosecution for those acts.

The double jeopardy clause of the fifth amendment protects against both multiple prosecutions and multiple punishments for the "same offense." United States v. Wittie, 25 F.3d 250, 254 (5th Cir. 1994), (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). This prosecution violates double jeopardy by exposing Mr. Witte to "multiple punishments" for the same act (i.e., conspiring and attempting to import cocaine).

The Fifth Circuit -- It Is Multiple Punishment But It Is Authorized

In United States v. Wittie the Fifth Circuit held that the double jeopardy clause was not violated when Mr. Witte was prosecuted for offense conduct (the cocaine offense) which had been fully accounted for as relevant conduct in a different, prior and final prosecution (the marijuana offense). 25 F.3d at 260.

Relying on this Court's comment in Williams v. Oklahoma, 358 U.S. 576, 585 (1959), that a sentencing judge "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime," the court determined that "the double use of single acts" apparently is permitted. 25 F.3d at 258.[3]

The Fifth Circuit recognized that "[t]he "real offense" approach [of the Sentencing Guidelines] to relevant conduct, however, may well lead to the conclusion that Witte was "punished" for the cocaine offense." 25 F.3d at 257.[4] Accepting analytically that there was a second punishment, the court went on to find that a second punishment was authorized by Congress. 25 F.3d at 258-62. The court noted that the commentary to section 5G1.3(b), application note 2, permits a defendant to be sentenced for different offenses that were part of the "same course of conduct". 25 F.3d 259 (emphasis in original). The court divined Congress's specific intent to permit limited multiple punishment by reading

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[3] The petitioner in Williams made a broad, unsuccessful due process challenge to the means in which his death sentence was imposed after his plea of guilty to a kidnapping charge. 358 U.S. at 581. He previously had been convicted for the murder of the kidnapping victim and had received a life sentence. 358 U.S. at 578. Williams failed to preserve a claim of double jeopardy by not raising it in the trial court. 358 U.S. at 585. Justice Douglas nevertheless dissented on the view that Williams was "in substance" twice tried for murder in violation of the guarantee against double jeopardy. 358 U.S. at 587.

[4] The Wittie court noted that in an earlier Fifth Circuit case, "Cruce expressly states that consideration of relevant conduct does not punish defendants for relevant conduct so considered but for the offense of conviction." 25 F.3d 259 n. 45, citing United States v. Cruce, 21 F.3d 70, 75 n. 8.

section 5G1.3(b) in pari materia with the command from section 1B1.3(a) that a defendant's sentence "must be determined on the basis of all relevant conduct,". 25 F.3d at 260.[5] One other opinion of the Fifth Circuit and a recent opinion from the Seventh Circuit align with this reasoning.[6]

The Tenth and Second Circuits --
Congress Intended to Preclude Second Prosecutions

The Tenth Circuit and the Second Circuit have held that a prosecution and sentence such as Mr. Witte faces violates double jeopardy. The Tenth Circuit considered this issue in United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S.Ct. 1695, 1705 (1992). In his first prosecution, Mr. Koonce was convicted for distributing "443 grams of [methamphetamine] he had mailed to [his cohort]." 945 F.2d at 1147. The district court sentenced Mr. Koonce, however, for 7,869 grams -- the 443 grams proved at trial plus 963 grams found at his home and 6,463 grams sold on other occasions. These additional amounts were included as

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[5] This limited concurrent sentence is of no help to Mr. Witte because, after his offense level was determined in the first prosecution, he received a downward departure to 144 months under section 5K1.1 for substantial assistance in the marijuana case. The effect of that downward departure is nullified if he is sentenced in the cocaine case to a concurrent but unreduced sentence of between 292 and 365 months imprisonment. The court suggests that the "harsh impact" of double punishment for the cocaine is "ameliorated" by giving Mr. Witte a concurrent sentence with credit under section 5G1.3(b) for time he has already served. Id. at 261.

[6] See United States v. Cruce, 21 F.3d 70 (5th Cir. 1994) and United States v. Brown, 1994 U.S. App. LEXIS 19766 *28-36 (7th Cir. August 1, 1994) (relying on Cruce).

"relevant conduct" under section 1B1.3, and they increased Mr. Koonce's offense level under the Guidelines. Id. at 1150.

The government then brought a second indictment charging Mr. Koonce with the 963 grams found at his home. The Tenth circuit rejected this attempt to punish the same conduct twice because it violated double jeopardy and contravened the legislative intent behind the creation of the Sentencing Guidelines. Id. at 1150-52.[7]

In United States v. McCormick, 992 F.2d 437 (2d Cir. 1993), the Second Circuit affirmed the dismissal of bank fraud charges that were used as relevant conduct in a prior case to compute and increase the defendant's offense level. The Second Circuit found that Congress's purpose in enacting the Sentencing Guidelines was to reduce the possibility of inconsistent sentences and arbitrary charging, especially with respect to determining a single punishment for "a set of similar acts [which] is specifically called for in cases of fraud."[8] Id. at 440-41.

Mr. McCormick was convicted after a trial in the District of Connecticut of a $75,000 bank fraud but was sentenced for $4 million of relevant conduct, an additional eight-step increase in

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[7] The Tenth Circuit did not have the current version of Section 5G1.3(b) when it decided Koonce. Wittie, 25 F.3d at 260.

[8] See U.S.S.G. § 2F1.1, comment. n. 6 ("the cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level ...."). Similarly, in drug cases U.S.S.G. § 2D1.1, comment. n. 6 provides that, "[w]here there are multiple transactions or multiple drug types, the quantities of drugs are to be added." Both fraud and drug offenses are among those specifically identified under the grouping rules in U.S.S.G. § 3D1.2(d).

his offense level. Id. at 438. The government then sought to prosecute him in the District of Vermont for the same fraud that the Connecticut court considered as relevant conduct (i.e., part of the $4 million) as well as other unrelated conduct.[9] Relying on Koonce, the Vermont district court dismissed certain counts of the indictment as a violation of double jeopardy (although it allowed prosecution of frauds not used to compute the Connecticut offense level. See United States v. McCormick, 798 F.Supp. 203 (D.Vt. 1992).

The Second Circuit affirmed, relying on Koonce. McCormick, 992 F.2d at 439. In addition, the Second Circuit concluded that section 5G1.3(b) was inapplicable to Mr. McCormick's situation. Id. 441 n. 3. The Court held that section 5G1.3(b) authorized multiple punishments at the first sentencing, thus precluding the second prosecution. Id. This contrasts markedly with the Fifth Circuit's analysis in Wittie which held that under relevant conduct principles, "the defendant is punished for both offenses both at sentencing for the first offense and at sentencing for the second offense." Wittie, 25 F.3d at 260.

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[9] The Vermont indictment was pending when the Connecticut case went to trial. McCormick, 992 F.2d at 438. The government suggested to the Connecticut court at sentencing that consideration of the Vermont conduct would preclude prosecution of that conduct in Vermont. Id. As a result, Mr. McCormick was sentenced at the top of the applicable guideline range, 46 months. Id.

Summary

The Fifth and the Seventh Circuits hold that "limited" multiple punishment under the Sentencing Guidelines for conduct that has already once been used to determine a sentence is consistent with the intent of Congress. The Second and Tenth Circuits assert that the double jeopardy clause forbids the second prosecution and punishment if the conduct already has been fully accounted for in the first sentencing and Congress's intent was to preclude the second prosecution for the relevant conduct. Because double punishment for the same offense violates the double jeopardy clause and because the conflict among the circuits creates exactly the kind of disparity in sentencing that the Sentencing Guidelines were enacted to curtail, this Court should grant Mr. Witte's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant his application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Date:
September 21, 1994

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellant,

v.

Steven Kurt WITTIE, Defendant-Appellee.

No. 93-2245.

United States Court of Appeals, Fifth Circuit.

June 23, 1994.

Defendant moved to dismiss indictment charging him with conspiracy and attempt to import 1,091 kilograms of cocaine. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., dismissed indictment based on violation of multiple punishments prong of double jeopardy clause, and government appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) even if use of cocaine to enhance defendant's base offense level on marijuana charges was punishment, subsequent indictment on cocaine charges would not violate double jeopardy, and (2) defendant did not establish that he had reasonable belief that plea agreement would provide immunity from prosecution in other cases arising from same course of conduct.

Reversed and remanded.

1. Criminal Law ⇐1139

Court of Appeals reviews de novo dismissal of indictment on double jeopardy grounds. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐5.1, 6

Double jeopardy clause protects defendants from both multiple prosecutions and multiple punishments for same offense. U.S.C.A. Const.Amend. 5.

3. Double Jeopardy ⇐151(5)

Prosecution of defendant for conspiracy and attempt to import cocaine did not violate double jeopardy clause, though defendant had been convicted of marijuana offense that was part of same course of conduct as cocaine offense, and cocaine was included as relevant conduct to determine defendant's base offense level for that offense of conviction; Sentencing Guidelines required consideration of all relevant conduct in determining defendant's sentence, and harsh impact of second punishment was reduced by causing sentences for both marijuana and cocaine offenses to run concurrently and by giving credit for time served. U.S.C.A. Const. Amend. 5; U.S.S.G. § 5G1.3(b), 18 U.S.C.A.App.

26. *State v. White*, 498 So.2d 1100, 1102 (La.Ct. App.1986), *writ denied*, 506 So.2d 109 (La.1987).

27. *Id.*

28. 28 U.S.C. § 2254(d).

29. Marvin Craig White also claimed that he received ineffective assistance of counsel and that the prosecution withheld exculpatory evidence. As to the former claim, counsel's failure to hire an expert does not fall outside a range of reasonable effectiveness under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). And absent evidence to support the allegation that the produced photo lineup differed from the first photo book shown to Gayle White, Marvin Craig White fails to establish a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

4. Double Jeopardy ⇐28, 134

Although multiple prosecutions always violate double jeopardy, multiple punishments for same offense may or may not violate double jeopardy; if legislature intended to impose multiple punishments for same offense, there is no constitutional prohibition. U.S.C.A. Const.Amend. 5.

5. Double Jeopardy ⇐2

Purpose of double jeopardy clause in multiple punishments context is to ensure that punishment assessed does not exceed that authorized by legislature. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐1244

Purpose of grouping offenses to require that defendant's base offense level be determined by aggregating drug quantities from multiple counts in single proceeding is to ensure that accused receives same sentence that he would have received had he been charged and convicted of one narcotics count based on same totality of facts. U.S.S.G. § 3D1.2, 18 U.S.C.A.App.

7. Double Jeopardy ⇐30

Using prior crimes to enhance sentence does not impinge on double jeopardy, because such consideration does not involve punishment. U.S.C.A. Const.Amend. 5.

8. Double Jeopardy ⇐30

If defendant is convicted of murder and given life sentence and is later convicted for having kidnapped murder victim, sentencing court may consider fact that kidnapping victim was murdered when assessing death penalty rather than life sentence without violating double jeopardy. U.S.C.A. Const. Amend. 5.

9. Criminal Law ⇐1210(3)

When sentencing court has considered marijuana conviction in determining offense level for cocaine offense arising out of same course of conduct, it must impose concurrent sentences. U.S.C.A. Const.Amend. 5.

10. Double Jeopardy ⇐131

Defendant may be prosecuted and sentenced in more than one federal proceeding for different criminal offenses that were part of same course of conduct.

11. Criminal Law ⇐1244

Defendant's base offense level for each offense of conviction must be determined on basis of all relevant conduct. U.S.S.G. § 1B1.3(a), 18 U.S.C.A.App.

12. Criminal Law ⇐1244

Sentencing Guidelines clearly provide that government may convict defendant of one offense and punish him for all relevant conduct; then indict and convict him for different offense that was part of same course of conduct as first offense and sentence him again for all relevant conduct. U.S.S.G. § 5G1.3, 18 U.S.C.A.App.

13. Criminal Law ⇐1298

Effect of substantial assistance received from defendant in its initial prosecution of that defendant on marijuana charges did not pass to subsequent sentencing proceeding for different offense of conviction on cocaine charges, though charges were part of same course of conduct, where substantial assistance that defendant gave related only to marijuana, not cocaine, offense. U.S.S.G. § 5K1.1, 18 U.S.C.A.App.

14. Criminal Law ⇐1139

Whether government has violated terms of plea agreement is question of law, which on appeal is reviewed de novo.

15. Criminal Law ⇐273.1(2)

In determining whether government has breached plea agreement, court must determine whether government's conduct is consistent with defendant's reasonable understanding of agreement.

16. Criminal Law ⇐273.1(2)

Defendant must prove underlying facts that establish breach of plea agreement by preponderance of evidence.

17. Criminal Law ⇐273.1(2)

Government did not breach defendant's plea agreement on marijuana offense by charging him with cocaine offense from same course of conduct, though defendant expressed belief during sentencing hearing on marijuana conviction that he would be im-

mune from prosecution in other cases, where his counsel immediately contradicted defendant's statement and asked court not to include cocaine because it would deprive defendant of opportunity to plead not guilty and go to trial on that offense.

18. Criminal Law ⇐273.1(2)

Defendant's indictment for cocaine offense did not charge him with count that was dismissed under plea agreement for marijuana offense, though sentencing court determined that both charges arose out of same course of conduct, where there was no finding that offenses were part of same conspiracy count that was dismissed.

Peggy M. Ronca, Paula C. Offenhauser, Asst. U.S. Attys., Lawrence D. Finder, U.S. Atty., Houston, TX, for appellant.

Thomas S. Berg, Roland E. Dahlin, II, Federal Public Defender, David Gerger, Asst. Federal Public Defender, Houston, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM and WIENER, Circuit Judges; KAUFMAN,* District Judge.

WIENER, Circuit Judge:

Plaintiff-Appellant the United States (the government) appeals the district court's dismissal of its two-count indictment that charged Defendant-Appellee Steven Kurt Witte[1] with conspiracy and attempt to import 1,091 kilograms of cocaine into the United States. The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment through inclusion of the indicted offense in relevant conduct at sentencing for a related offense to determine Witte's base offense level. We disagree with the district court's conclusion that Witte would be subjected to impermissible multiple punishments for the same offense and therefore reverse and remand.

I

FACTS AND PROCEEDINGS

In August 1989, undercover DEA Agent Roger Norman negotiated with Dennis Mason in Tucson, Arizona to transport marijuana from Mexico into the United States. The negotiations were unsuccessful, but discussions between Norman and Mason resumed in Houston in June 1990. At that time, Witte, Mason, and Tom Pokorny planned to import marijuana from Mexico and cocaine from Guatemala. Both the Mexico deal and the Guatemala deal were going on simultaneously. Norman's job would be to fly the contraband into the United States.

In July 1990, the Mexican marijuana source advised that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The following month, Norman was told that the Mexicans were ready with 4,400 pounds of marijuana. Once Norman learned the coordinates of the airstrip, arrangements were made to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, 591 kilograms of cocaine were seized. The following day, while still undercover, Norman met Witte to explain that the pilots had been unable to land in Mexico because police had shown up at the airstrip.

Witte, Mason, and Pokorny were not charged with conspiracy and attempt to import cocaine at the time because Mason was incarcerated in Mexico and Pokorny's whereabouts were under investigation. All contact between Witte and Norman ceased until January 1991.

Norman next contacted Witte in January 1991 and asked Witte if he were interested in purchasing 1000 pounds of marijuana from Norman. Witte answered affirmatively, and said that he would call Norman to tell him whether he could raise the $50,000 downpayment. Witte telephoned three days later

* District Judge of the District of Maryland, sitting by designation.

1. Witte, not Wittie, is the correct spelling.

from Denver, Colorado stating that he had the downpayment. Witte asked Norman—who still had possession of Witte's horse trailer from the prior activities—to return the trailer so that it could be used as a load vehicle for the marijuana. Witte stated that he would bring from Denver a motor home owned by Sam Kelly to use as a second load vehicle.

On February 7, 1991, Witte met Norman in Houston and informed him that he could only come up with half of the downpayment. Norman agreed to give Witte 1000 pounds of marijuana for $25,000 in downpayment and to allow Witte three days to obtain the balance. Witte introduced Norman to Kelly and showed Kelly's motor home and its various hidden compartments to Norman. Fellow undercover officers took the motor home and trailer to load the marijuana, at which time Witte and Kelly took Norman to Witte's hotel room to view the money. The two vehicles arrived loaded with approximately 375 pounds of marijuana.[2] Witte and Kelly took possession and were promptly arrested.

The government indicted Witte for (1) conspiring to possess with intent to distribute more than 100 kilograms of marijuana [3] and (2) aiding and abetting possession with intent to distribute marijuana (collectively, the marijuana offense).[4] The charges resulted from the January–February 1991 "reverse-buy" of marijuana. Facing a statutory range of 5–40 years,[5] Witte entered a Rule 11(e)(1)(B) plea agreement with the government.

Witte pleaded guilty to the substantive count of aiding and abetting possession with intent to distribute marijuana and agreed to cooperate with the government by providing truthful and complete information concerning the charged offense as well as any others about which he might be questioned. The government agreed to dismiss count one of the indictment—conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991—and to file a § 5K1.1 motion if Witte's cooperation amounted to substantial assistance. Although not expressed in the recitation of terms of the agreement, the government states that Witte was also promised a recommendation to a three-year cap if he brought in Pokorny, who was involved in the cocaine offense. Although Witte did not assist the government in locating Pokorny, Witte's cooperation did cause his co-defendant in the marijuana offense, Sam Kelly, to plead guilty.

At sentencing, the district court found that the marijuana and cocaine offenses were part of the "same course of conduct." Over objections by both Witte and the government, the court included the cocaine in relevant conduct to determine Witte's base offense level.[6] The government urged the court to accept the parties' position that the cocaine deal was not relevant to the marijuana deal. The government argued against inclusion of the cocaine because it planned to indict Witte later for the cocaine offense. If the cocaine were not included in relevant conduct, the government could seek consecutive sentences for the cocaine and marijuana offenses. On the other hand, Witte objected to inclusion of the cocaine because he hoped for a shorter sentence: if only the 375 pounds of marijuana were considered, the Guideline range would be 63 to 78 months rather than 292 to 365 months.

Witte's base offense level was pegged at 40, with a Guideline range of 292 to 365 months. From that base offense level, Witte received a 2-level increase for his aggravating role in the offense and an offsetting 2-level decrease for acceptance of responsibility. The court granted the government's § 5K1.1 motion for downward departure based on Witte's substantial assistance. By

2. The vehicles were actually loaded with approximately 1,000 pounds of marijuana, but the government stipulated to the lesser quantity.

3. 21 U.S.C. § 841(a)(1), (b)(1)(B); 21 U.S.C. § 846.

4. 21 U.S.C. § 841(a)(1), (b)(1)(B); 18 U.S.C. § 2.

5. 21 U.S.C. § 841(b)(1)(B).

6. It is not clear whether the court determined the quantity of drugs involved in the cocaine offense to be 591 kilos (the amount seized) or 1,091 kilos (the amount seized plus an additional 500 kilos discussed). But inclusion of either quantity in relevant conduct results in a Guideline range of 40 (500–1500 kilos of cocaine).

virtue of that departure, Witte was sentenced to 144 months—148 months below the minimum sentence of 292 months under the pre-departure Guideline range. Witte appealed, but the appeal was dismissed due to Witte's failure to file a brief.

The government then indicted Witte and co-defendant Pokorny on two additional counts: (1) conspiring to import cocaine [7] and (2) aiding and abetting in the attempt to import cocaine [8] (collectively, the cocaine offense).[9] The indictment alleges that, between August 1989 and August 1990, Witte tried to import about 1,091 kilograms of cocaine from Central America. Witte moved to dismiss, arguing that he had already been punished for the cocaine offense because the cocaine was included in relevant conduct at sentencing for the marijuana offense. Witte also argued that the indictment breached the plea agreement.

The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment because the indicted offense had been included in relevant conduct at sentencing for the marijuana offense to determine Witte's base offense level. The court's conclusion on the breach of the plea agreement issue is not so clear, but it does not appear that the indictment was dismissed on that basis.[10] The government timely appealed the dismissal of the indictment.

7. 21 U.S.C. §§ 952(a), 960(b)(2)(B), 963.

8. 21 U.S.C. §§ 952(a), 960(b)(2)(B) and 18 U.S.C. § 2.

9. Although the "cocaine offense" involved the importation of cocaine and marijuana, it is referred to as the cocaine offense to distinguish it from the 1991 activities involving marijuana—the "marijuana offense."

10. The court stated that "[t]he effect of permitting such carving also defeats the spirit and intent of the plea bargaining process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away." The minute entry reads, "[T]he motion to dismiss on the basis of double jeopardy is granted."

II

ANALYSIS

A. *Double Jeopardy*

1. Standard of Review

[1] We review de novo the dismissal of the cocaine indictment on grounds of double jeopardy.[11]

2. Multiple Punishments Prohibited?

[2, 3] The Double Jeopardy Clause provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb." [12] The Supreme Court has left no doubt that the clause protects defendants from both multiple prosecutions and multiple punishments for the "same offense." [13] Witte argues that the government's present attempt to punish him for the cocaine offense violates double jeopardy's multiple punishments prong: he has already been "punished" for the cocaine offense charged in the subject indictment.

[4, 5] At the outset, we note the importance of distinguishing double jeopardy's prohibition of multiple prosecutions from its protection against impermissible multiple punishments. Although multiple prosecutions, i.e., more than one *prosecution* by the same sovereign for the same offense, always violate double jeopardy,[14] multiple *punishments* for the same offense *may* or *may not* violate double jeopardy. That is because Congress (or a state legislature) determines the scope

11. *United States v. Vasquez-Rodriguez*, 978 F.2d 867, 870 (5th Cir.1992); *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir.), *cert. denied*, 451 U.S. 974, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981).

12. U.S. Const. amend. V.

13. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076–77, 23 L.Ed.2d 656 (1969).

14. We emphasize that the indictment or the prosecution does not run afoul of the prohibition against multiple prosecutions. Witte is not subject to multiple prosecutions for the cocaine offense—he was never placed in jeopardy for that offense. Our concern is with the punishment that would result if Witte were to be prosecuted for the cocaine offense: he is potentially subject to multiple punishments for the cocaine offense.

of the constitutional protection in the multiple punishments context. If the legislature intended to impose multiple punishments for the same offense, imposition of such sentences does not violate the Constitution.[15] The purpose of the Double Jeopardy Clause in the multiple punishments context is to ensure that the punishment assessed does not exceed that authorized by the legislature (either the length of the sentence or the number of times that the sentence is imposed).[16]

For purposes of double jeopardy, the drugs involved in the "same offense"—conspiring and attempting to import cocaine—were included in relevant conduct to sentence Witte for the marijuana offense and are the subject of the dismissed indictment.[17] The pertinent issues are (1) whether inclusion of the cocaine in relevant conduct at sentencing for the marijuana offense punished Witte for the cocaine offense, and if so, (2) whether Congress has authorized single or multiple punishment for the cocaine offense. This double jeopardy issue is *res nova* in this circuit, but the Second and Tenth Circuits have considered it.[18] Both have concluded that a defendant's acts included as relevant conduct in calculating punishment for one offense may not later form the basis of another indictment without violating double jeopardy.[19]

In *United States v. Koonce*,[20] the defendant was convicted of distributing 443 grams of methamphetamine that he had mailed to his cohort. The district court sentenced him, however, for 7,869 grams. That quantity included 443 grams proved at trial, 963 grams found in his home, and 6,463 grams that Koonce was purported to have sold on other occasions. Inclusion of the additional grams in "relevant conduct" increased Koonce's offense level under the Guidelines from 32 (range: 188 to 235 months) to 34 (range: 235–293 months). Unlike Witte, Koonce received the maximum statutory sentence for all of the drugs (240 months).[21]

The government then brought a second indictment charging Koonce with the 963 grams of methamphetamine found in his home. The Tenth Circuit employed a three-

15. *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 678–79, 74 L.Ed.2d 535 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981)).

16. *Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 2525–26, 105 L.Ed.2d 322 (1989); *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985); *Missouri v. Hunter*, 459 U.S. 359, 366–68, 103 S.Ct. 673, 678–79, 74 L.Ed.2d 535 (1983); *Pearce*, 395 U.S. at 711, 89 S.Ct. at 2072; *United States v. Martinez*, 931 F.2d 851, 853 (11th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 268, 116 L.Ed.2d 221 (1991).

17. Thus both parties assume that the "same offense" element is satisfied under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). But clearly the statute under which Witte was convicted and the statutes under which he is now indicted proscribe different offenses, i.e., aiding and abetting possession of a controlled substance (21 U.S.C. § 841(a)(1); 18 U.S.C. § 2), and conspiring to import, and aiding and abetting in the attempt to import, a controlled substance (21 U.S.C. §§ 952(a), 963; 18 U.S.C. § 2). *Cf. Hunter*, 459 U.S. at 367, 103 S.Ct. at 678–79; *United States v. Cruce*, 21 F.3d 70, 75–76 (5th Cir.1994). We address the issues in this case, however, as they were presented by the parties.

18. Since this appeal was argued and taken under submission, another panel of this court has addressed the same issue that is now before us and has concluded, as we do, that double jeopardy does not preclude the subsequent prosecution and conviction of conduct that was earlier included in relevant conduct. *See Cruce*, 21 F.3d 70.

19. *United States v. Koonce*, 945 F.2d 1145 (10th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1695, 118 L.Ed.2d 406 and — U.S. —, 112 S.Ct. 1705, 118 L.Ed.2d 413 (1992); *United States v. McCormick*, 992 F.2d 437 (2d Cir.1993).

20. *Id.* *Koonce* was relied on by the district court in dismissing the indictment.

21. This fact does not distinguish *Koonce* from the case before us for purposes of double jeopardy analysis. If, like Koonce, Witte had received the statutory maximum sentence for all of the drugs (365 months), it might appear wasteful—though not a violation of double jeopardy—to prosecute him for the cocaine offense. But as Witte's counsel admitted at oral argument, the government does recognize some benefit from a second conviction: it receives a $50 cost assessment to balance the budget, and more importantly, the second conviction serves as a predicate for enhanced punishment under recidivist statutes. That second conviction reflects Witte's actual recidivist status.

step analysis to determine whether double jeopardy was thereby violated: First, had Koonce been punished for the methamphetamine found at his residence? Second, if so, did Congress intend that an accused in Koonce's position receive *cumulative*—although not necessarily *consecutive*—sentences from two separate proceedings if both sentences punish the accused for exactly the same conduct? Finally, if the first two inquiries are answered affirmatively, does the second punishment constitute "double" punishment even though the sentence derived therefrom is specified to run concurrently with the first sentence?

In answering the initial inquiry, the court concluded that Koonce had been punished for the drugs found at his residence because his base offense level would have been lower had they not been included via the relevant conduct provisions of the Guidelines. The "real offense" approach of the Guidelines required that Koonce be *punished* for the acts included in relevant conduct; therefore, concluded the *Koonce* court, he was punished.[22]

[6] Second, the *Koonce* court found that the government had failed to point out "any authority holding that Congress intended to punish a defendant a second time for conduct that [had] previously been aggregated into the base offense level for a related sentence in an earlier prosecution."[23] The court relied on (1) § 3D1.2's grouping requirement, which mandates that a defendant's base offense level be determined by aggregating drug quantities from multiple counts in a single proceeding, and (2) the Sentencing Commission's announced goal of preventing prosecutorial charge manipulation,[24] to determine that Congress intended only one punishment rather than multiple punishments. The purpose of grouping is to ensure that an accused receives the same sentence that he would have received had he been charged and convicted of one narcotics count based on the same totality of facts. Recognizing that Koonce had received the statutory maximum sentence possible for the total quantity of drugs, the Tenth Circuit concluded that Congress could not have intended a larger punishment if a defendant were prosecuted in two proceedings.

Third, the *Koonce* court concluded that even if the defendant's second sentence were specified to run totally concurrent with the first, a second sentence would violate double jeopardy. The court relied on *Ball v. United States*.[25] Ball, a previously convicted felon, was convicted in one proceeding for (1) the "receipt" of a firearm and (2) the "possession" of a firearm. He was sentenced to consecutive terms of imprisonment. On appeal, the Fourth Circuit remanded with instructions to modify the sentences to make them concurrent. The Supreme Court concluded that, as both offenses were established by the same criminal act, Congress had not intended to subject Ball to two *convictions*. Thus "one of the convictions, as well as its concurrent sentence, [was] unauthorized punishment for a separate offense."[26] In Koonce, the Tenth Circuit relied upon these statements to posit that a concurrent sentence can be "punishment."[27] As the Tenth Circuit had already decided that Congress had authorized only one punishment for that criminal act, the court concluded that this second punishment violated double jeopardy.

22. *Id.* (emphasis added).

23. *Id.*, 945 F.2d at 1151.

24. *Id.*, 945 F.2d at 1151–52; United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A.4(a), policy statement (1993).

25. 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

26. *Ball*, 470 U.S. at 864, 105 S.Ct. at 1673. "A separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences...." *Id.* at 865, 105 S.Ct. at 1673–74 (noting the potential for an increased sentence under a recidivist statute, possible delays in parole eligibility, and the societal stigma that results from the conviction itself).

27. *Koonce*, 945 F.2d at 1153. We do not disagree, but note that *any* sentence is punishment. The issue on which we part ways with the Tenth Circuit is whether a second punishment is authorized by Congress, the second element of the Tenth Circuit's analysis.

In *United States v. McCormick*,[28] the Second Circuit adopted *Koonce*'s analytical framework. It affirmed the dismissal of bank fraud charges for acts that were used in a prior case as relevant conduct to compute the defendant's base offense level. McCormick was charged with bank fraud in Connecticut that resulted in a $75,000 loss. Subsequent to that indictment, McCormick was charged for bank fraud in Vermont that allegedly resulted in a $4 million loss. He was then convicted on the Connecticut bank fraud charge. At sentencing for the Connecticut conviction, the loss was calculated to be in the $2.5–5 million range, a sum that obviously included the Vermont loss. McCormick's motion to dismiss the Vermont bank fraud charges on double jeopardy grounds was granted.

The Second Circuit determined that inclusion of the Vermont amount in relevant conduct amounted to punishment for the Vermont fraud in the Connecticut proceedings, and that a second punishment for the Vermont loss would violate double jeopardy. The Sentencing Guidelines' grouping provision requires that defendants in fraud cases, like drug offenders, be assessed "a single punishment for a set of similar acts."[29] "The Guidelines achieve consistency in sentencing for fraud cases by grouping all of the relevant conduct and applying a single offense level to the whole course of conduct."[30] The Second Circuit concluded that Congress apparently did not intend to allow a defendant to be *prosecuted* for conduct already used to increase his or her offense level. Being skeptical of the way that the Tenth and Second Circuits reached those results, we now examine the double jeopardy question independently.

28. 992 F.2d 437 (2d Cir.1993).

29. 992 F.2d at 440; *see* U.S.S.G. § 2F1.1, comment. (n. 6) ("The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.").

30. 992 F.2d at 440.

31. If a defendant is convicted of murder and given a life sentence, and is later convicted for having kidnapped the murder victim, the sentencing court may consider the fact that the kidnaping victim was murdered when assessing a death penalty rather than a life sentence without violating double jeopardy. *Williams v. Oklahoma*, 358 U.S. 576, 585–86, 79 S.Ct. 421, 426–27, 3 L.Ed.2d 516 (1959).

32. *Sekou v. Blackburn*, 796 F.2d 108, 111–12 (5th Cir.1986) ("[C]onsideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered." 796 F.2d at 112.).

a. Inclusion of Cocaine in Relevant Conduct: Punishment?

First, the government contends that inclusion of the cocaine in relevant conduct to *calculate* the defendant's base offense level is legally no different than *enhancing* his sentence by increasing a base offense level to a higher level under the Guidelines because of prior criminal activity. As increasing a base offense level by use of prior crimes is not "punishment" for prior crimes, argues the government, neither is using prior crimes to calculate a base offense level punishment for those prior crimes. Thus, concludes the government, Witte has not been "punished" for the cocaine offense. Witte counters that although enhancement of a sentence may not be punishment, counting the cocaine to determine his base offense level, with a corresponding 287-month increase in the maximum possible length of his sentence, is punishment.

[7, 8] It is well-settled that using prior crimes to "*enhance*" a sentence does not impinge on double jeopardy, because defendants are not "punished" for crimes so considered.[31] Pre-Guidelines, uncharged criminal conduct could be "considered" at sentencing as aggravating circumstances and could still form the basis of a later indictment, conviction, and sentence without violating double jeopardy.[32] The "real offense" approach to relevant conduct, however, may well lead to the conclusion that Witte was "punished" for the cocaine offense.

Stepping back from the somewhat artificial distinction between enhancement and calculation of a base offense level, we examine whether, pre-Guidelines, the prosecution and

punishment of Witte for the cocaine offense would have been foreclosed because Witte's cocaine activities were considered in imposing sentence for the marijuana offense. *Williams v. Oklahoma*[33] indicates that the answer is no. As the Supreme Court noted in *Williams*, the sentencing court "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[34]

> And in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor to have denied to him due process of law in violation of the Fourteenth Amendment.[35]

In Witte's case, the sentencing court is required by the Guideline's relevant conduct rules to consider the circumstances surrounding the particular offense of conviction. We find it clear that, like the crimes of kidnap and murder of the kidnap victim in *Williams*, the marijuana charge to which Witte pleaded guilty and was sentenced is an offense separate and distinct from the cocaine offense.[36] If, in *Williams*, consideration of the conduct constituting the separate offense of murder to increase the severity of the sentence for kidnaping was not punishment for the conduct so considered, then the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct. Of course, there is double use of single acts, but *Williams* apparently permits this. Williams was given a life sentence for murder and then the same murder was used to step up his punishment for kidnaping to death.

The only ostensible missing link in this analysis lies in the answer to the question whether, when Williams was sentenced to life imprisonment for murder, the sentencing court considered the kidnaping of the murder victim. Although not clear from the text of *Williams*, we may fairly assume that the uncharged kidnaping was considered when Williams was sentenced for murder. After all, the sentencing court "[was] authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[37] If so, then *Williams* is this case—*pre*-Guidelines.

[9] The fact that Witte's double jeopardy challenge arises *post*-Guidelines does not change the analysis of the punishment issue presented in *Williams*. Before adoption of the Guidelines, judges exercised their sound discretion in determining the appropriate level of punishment within established statutory ranges of imprisonment. Post-Guidelines, judges are still required to determine a sentence within an established statutory range. The Guidelines simply provide a formulae for what used to be left to trial court discretion. To improve consistency in sentencing, the Guidelines attempt to accommodate multiple uses of conduct. Specifically, the Guidelines require that when, in cases such as Witte's, the sentencing court has considered the marijuana conviction in determining the offense level for the cocaine offense, the court must impose concurrent sentences.[38]

Even if we assume arguendo that *Williams* does not absolutely dispose of this threshold punishment question, we would not end our analysis at this juncture. Rather, we accept for purposes of our analysis that Witte has been punished by inclusion of the cocaine activities in relevant conduct and proceed to consider whether a second punishment is nonetheless permitted by Congress.

b. Guidelines Authorize Multiple Punishment

We therefore turn to the Guidelines to determine the appropriate punishment—sin-

33. 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516.

34. 358 U.S. at 585, 79 S.Ct. at 426-27.

35. 358 U.S. at 586, 79 S.Ct. at 427.

36. *See supra* note 17.

37. *Williams*, 358 U.S. at 585, 79 S.Ct. at 427.

38. U.S.S.G. § 5G1.3(b). This subsection will be discussed in further detail in Part B, Section 2 of this opinion.

gle or multiple—to be assessed.[39] The Tenth Circuit's observation that grouping rules under the Guidelines prevents double counting and thus count manipulation is accurate. If Witte had been convicted in one proceeding of both the cocaine and marijuana offenses, grouping of counts—aggregation of the drug quantities—would result in a Guideline range of 292–365 months. The high end of the range serves as a cap to the *length* of the sentence (punishment) that Witte can receive for both offenses.[40] But the question here is whether Congress intended Witte to be subject to multiple punishments (a second punishment) for the cocaine—that had already been included in relevant conduct for a related sentence—as long as the aggregate length of his sentences did not exceed the lesser of the cap provided by the range or the statutory maximum sentence.

[10, 11] The Tenth Circuit found no authority in the Guidelines that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution.[41] But that court did not have the benefit of the present § 5G1.3(b) of the Guidelines, which Witte concedes in his motion to dismiss would require imposition of concurrent sentences if he were tried and convicted of the cocaine offense. Section 5G1.3 provides in pertinent part:

> *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment*
>
> (b) If ... the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.[42]

The commentary to § 5G1.3(b), application note 2, reflects that

> Subsection (b) ... addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions,[43] for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.[44]

The commentary clearly permits a defendant to be prosecuted—and sentenced—in more than one federal proceeding for different criminal offenses that were part of the *same course of conduct*.[45] More importantly, a

39. *United States v. McCormick*, 992 F.2d 437, 442 n. 1 (2d Cir.1993) (Mahoney, J., dissenting) (noting that the majority properly recognized that "in the sentencing area, Congressional intent is reflected in the Sentencing Guidelines").

40. The same is true if Witte is convicted in two separate proceedings for these offenses. His punishment cannot exceed 365 months in length. As we will demonstrate, this is accomplished by imposing concurrent sentences.

41. *Id.*, 945 F.2d at 1151.

42. U.S.S.G. § 5G1.3.

43. Two separate indictments were brought against Witte in the same federal jurisdiction, the Southern District of Texas (Houston division). Although subsection (b) discusses "two or more federal jurisdictions," Witte does not argue that § 5G1.3(b) does not apply on this basis. A common sense approach to that language is that subsection (b) also addresses prosecutions in "the same federal jurisdiction twice," i.e., the Southern District of Texas and the Southern District of Texas. Subsection (b) probably assumes that multiple counts resulting from the same course of conduct would be brought together if they occur in the same federal jurisdiction. Just as there are valid reasons for bringing two separate indictments against a defendant in two federal jurisdictions, there are valid reasons for bringing two separate indictments against a defendant in the same jurisdiction. In this case, the government did not believe that the offenses were part of the same course of conduct and had not completed its investigation of the cocaine offense.

44. U.S.S.G. § 5G1.3, comment. (n. 2).

45. *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994). In *Cruce*, this circuit indicated its disagreement with the Tenth and Second Circuits' views in *Koonce* and *McCormick*. Therefore, in this opinion, this panel is not free to adopt the approach of those cases. In *Cruce*, as in this case, it is to be noted that the defendants faced punishment for conduct that had not been charged, but that had been included in relevant

defendant's base offense level for each offense of conviction—unless the Guidelines expressly provide otherwise—*must* be determined on the basis of *all relevant conduct*.[46] The principle that all relevant conduct be considered in determining a defendant's base offense level is neither optional nor hortatory; it is mandatory.

[12] Read in pari materia, § 5G1.3(b) clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him *again* for all relevant conduct. To repeat, this proposition merely reflects Congress's specific intent that *all* relevant conduct be considered in determining a defendant's sentence. Consequently, we find no basis for distinguishing the situation described by § 5G1.3(b) from the one before us today.

Like it or not, we are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings—and that Congress accomplishes this intent—not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction on both counts in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding. Thus § 5G1.3(b) is "authority ... that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution," authority that the Tenth Circuit—without the benefit of § 5G1.3(b) in its present form—found lacking when it analyzed Koonce's double jeopardy challenge.[47]

The Second Circuit had the benefit of § 5G1.3(b) but distinguished the situation in *McCormick* from that described in § 5G1.3(b). That distinction concerns *when* the defendant will be punished for both offenses in a single sentencing proceeding, i.e., whether the defendant will be punished for both offenses at sentencing for the first offense (McCormick's situation) *or* at sentencing for the second offense (the Second Circuit's view of § 5G1.3(b)). But in our view, under § 5G1.3(b) and relevant conduct principles, the defendant is punished for both offenses *both* at sentencing for the first offense *and* at sentencing for the second offense.

With all due respect, we believe that the Second Circuit's analysis of § 5G1.3(b) suffers from two errors: first, it ignores—under § 5G1.3(b)—the application of relevant conduct principles to sentencing for the first offense; second, it does not consider McCormick's situation *at the relevant stage* addressed by § 5G1.3(b), i.e., at the sentencing stage for purposes of the instant offense.[48] The *McCormick* court did not consider that, *at sentencing* for the second offense, McCormick could be punished *again* for all relevant conduct. Section 5G1.3(b) assumes that a defendant has been prosecuted and convicted for the instant offense—an offense that was

conduct when they were sentenced in an earlier prosecution. *Cruce* expressly states that consideration of relevant conduct does not punish defendants *for relevant conduct* so considered but *for the offense of conviction*. *Id.* at 75 n. 8. Despite the temporal differences noted by the majority in *McCormick* between those circumstances and the circumstances set forth in § 5G1.3(b), the court in *Cruce* concluded that § 5G1.3(b) applied to the defendants because "it is clear that Congress and the Sentencing Commission anticipated the imposition of punishment—whether concurrent or consecutive—in a second proceeding and, thus, did not intend to preclude such proceeding." *Id.* at 77 n. 11. Accordingly, *Cruce* held that the second punishment did not violate double jeopardy.

46. U.S.S.G. § 1B1.3(a).

47. *Koonce*, 945 F.2d at 1151.

48. 992 F.2d at 441 n. 3. Again, it is the punishment or the sentence imposed for the cocaine offense, not the prosecution for that offense, that implicates double jeopardy concerns. If multiple punishments are impermissible, we foreclose a prosecution for the cocaine offense not because the prosecution would violate double jeopardy, but because it would be a waste of judicial resources to proceed to the sentencing stage only to have imposition of a sentence barred by double jeopardy.

part of the *same course of conduct* as an offense for which there is already a conviction and for which an appropriate *Guidelines* sentence has been assessed (hence the application of relevant conduct at the first sentencing proceeding)—and that it has proceeded to the sentencing stage.

Nevertheless, the Second Circuit recognized that in a case governed by subsection (b), the Sentencing Commission would require concurrent sentencing to avoid multiple punishments.[49] Thus, two sentences, though concurrent, have been authorized by the legislature in this situation, and thus would not violate double jeopardy. The significance of this analysis should be obvious: it is not the subsequent *prosecution* that is affected, but the subsequent *sentence* that may be pronounced and the manner in which such sentence may be imposed, assuming that the permitted subsequent prosecution produces a conviction.

3. Sentencing for the Cocaine Offense

[13] Witte argues that the drafters of § 5G1.3(b) could not have foreseen the circumstances of this case: a 5K1.1 motion in the first prosecution that will not pass to the second prosecution. Witte insists that it is unfair to allow the government—which received substantial assistance from a defendant in its initial prosecution of that defendant—to seek imposition of a *longer*, though concurrent, second sentence. In effect, Witte is asking this court to adopt a per se rule that the second sentence imposed cannot exceed the first if the first resulted from a § 5K1.1 motion, i.e., to "pass" the effect of a 5K1.1 motion from one sentencing proceeding for one offense of conviction to a subsequent sentencing proceeding for another offense of conviction. But Witte's otherwise appealing argument ignores an important aspect of the substantial assistance that he gave: It related only to the marijuana offense, not the cocaine offense. Significantly, Witte's argument also ignores application note 2 to § 5G1.3(b) and the background to this section, which makes clear that § 5G1.3(b) is intended to result in the appropriate incremental punishment that most nearly approximates the sentence that would have been imposed had both sentences been imposed at the same time.[50] This is accomplished both by (1) imposition of a concurrent sentence, and (2) giving credit for time served.

If Witte is ultimately convicted of the cocaine offense, the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses. Even so, there may be still be adjustments to the base offense level. For example, that level could be increased for an aggravating role or decreased for acceptance of responsibility.[51] For illustrative purposes, we assume that the offense level will again be 40, and that the Guideline range will be 292–365 months.[52] The sentencing court will then have to determine the appropriate *total* punishment for *both* offenses. For purposes of this illustration, we choose 292 months as the appropriate total punishment. Witte must then receive credit for time served. If, for example, Witte shall have served 30 months for the marijuana offense by the time of the second sentencing, the sentencing court must credit Witte with 30 months served, and impose a sentence of 262 months (292 minus 30) to run concurrently with the remainder of Witte's sentence for the marijuana offense. As the commentary to § 5G1.3(b) emphasizes, the 262-month sentence is not a departure from the Guidelines, but reflects a credit for Guidelines purposes for time that Witte has served. Under § 5G1.3(b), then, Congress allows "double punishment" for the cocaine offense but ameliorates its harsh impact and prevents punishment from exceeding the statutory maximum by causing sentences for both the marijuana and cocaine offenses to run concurrently and by giving credit for time served.

49. 992 F.2d at 441 n. 3.

50. U.S.S.G. § 5G1.3, comment. (n. 2, backg'd.).

51. *See* U.S.S.G. § 5G1.3(b), comment. (n. 2).

52. The sentencing court could even depart from the applicable Guideline range in response to a § 5K1.1 motion.

We turn now to the alternative basis urged by Witte for dismissal of the indictment.

B. *Breach of Plea Agreement*

Witte claims that the government breached the plea agreement by "re-indicting" the "same conspiracy." Again, as part of the plea agreement for the marijuana offense, the government dismissed the first count against Witte, conspiring to possess with intent to distribute more than 100 kilograms of marijuana from January 25, 1991 to February 8, 1991.

1. Standard of Review

[14] Whether the government has violated the terms of the plea agreement is a question of law, which on appeal is reviewed de novo.[53]

2. No Breach

[15, 16] In determining whether the government has breached a plea agreement, the court must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement."[54] The defendant must prove the underlying facts that establish a breach by a preponderance of the evidence.[55]

[17] During the sentencing hearing, Witte expressed a belief that he would be immune from prosecution in other cases. But Witte's counsel immediately contradicted Witte's statement. Additionally, his counsel asked the court not to include the cocaine because it would deprive Witte of the opportunity to plead not guilty and go to trial on that offense, not—as Witte contends—so that he could argue "breach of the plea agreement." Witte was expressly informed by the court that the government wanted to indict him later on the cocaine offense, and Witte expressed his understanding of this advice. Finally, Witte's substantial assistance did not relate to the cocaine offense, but only to the marijuana offense. Thus even if Witte somehow subjectively clung to the belief that he could not be prosecuted for the cocaine offense, that is not a reasonable understanding of the plea agreement. The government has not breached that agreement.

[18] Witte nevertheless contends that the government's present indictment charges him with the count that was dismissed pursuant to the plea agreement. We disagree. This indictment charges Witte with conspiring and attempting to import 1,091 kilograms of cocaine between August 1989 and August 1990. The government dismissed a count of conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991. Witte argues, though, that the same conspiracy underlies both counts, and that the government is bound under either of two doctrines—(1) the law of the case, or (2) collateral estoppel—by a "same conspiracy" finding by the sentencing court. Witte premises his argument on the novel idea that the sentencing court's "same course of conduct" finding constitutes a "same conspiracy" finding. This argument is unavailing.

A same conspiracy finding may be necessary to include the acts and omissions of *others* as relevant conduct, but it is not necessary to include Witte's own acts in relevant conduct.[56] The PSR Addendum refers to Witte's "agreement" (i.e., conspiracy), but the district court never specifically stated that he adopted the PSR or that specific finding. The only express finding by the sentencing court on this issue is that the relevant conduct spelled out in the PSR was "relevant conduct *related to the charge* to which he pleaded guilty." Neither did the sentencing court find that the cocaine and marijuana offenses were part of the "same conspiracy" count that was dismissed.

Even if on dismissing the indictment the district court had found that the marijuana and cocaine offenses were part of the same conspiracy, we would review such a finding

53. *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir.1993).

54. *Valencia*, 985 F.2d at 761 (citing *United States v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir. 1991)).

55. *United States v. Hernandez*, 996 F.2d 62, 64 (5th Cir.1993).

56. U.S.S.G. § 1B1.3(a)(1)(A), (a)(1)(B), (a)(2).

for clear error only. Under the facts of this case, it is obvious that two distinct conspiracies were involved: they were separated by time; they involved different co-conspirators; they involved different statutory offenses; they included different overt acts in each offense charged; and they occurred in different geographical locations.[57] Witte clearly has not been indicted for the same conspiracy count that was dismissed pursuant to the plea agreement.

III

CONCLUSION

For the foregoing reasons, we conclude that the district court improperly dismissed the indictment on double jeopardy grounds. Neither may the court's dismissal of the indictment be sustained on grounds that the government breached the plea agreement. The dismissal of the indictment is therefore REVERSED and the case REMANDED for proceedings consistent with this opinion.

25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

FEB 25 1993

Michael N. Milby, Clerk
By Deputy:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CIVIL ACTION NO. H-92-207
	§	
KURT STEVEN WITTE,	§	
	§	
Defendant.	§	

FEDERAL PUBLIC DEFENDER
RECEIVED
FEB 25 1993
SOUTHERN DIST. OF TEXAS
HOUSTON, TEXAS

ORDER DISMISSING INDICTMENT AS TO KURT STEVEN WITTE

Pending before the Court is the defendant's, Kurt Steven Witte, motion to dismiss because of double jeopardy and because of his claim that the government, in bringing these charges, breached its plea agreement with him. After reviewing the defendant's motion and the attachments and the government's response to the motion, the Court determines that the motion should be granted.

On March 4, 1991, a two-count indictment was filed in this District against the defendant in cause number H-91-33 charging him with conspiracy to process with intent to distribute marijuana and with aiding and abetting in the attempt to possess with intent to distribute marijuana, in violation of Title 21 U.S.C. §§841(a)(1), (b)(1)(B) and 846 and Title 18 U.S.C. §2.

Subsequently, the defendant entered a plea of guilty to Count 2, the aiding and abetting charge, pursuant to a plea agreement. That agreement provided that, in exchange for his plea of guilty and agreement to cooperate with the government in the marijuana case, the government would dismiss Count 1 of the indictment (*the conspiracy count*) and if it deemed the defendant's cooperation substantial a U.S.S.G. §5K1.1 motion for a downward departure in sentence would be filed.

As agreed, the co-defendant pled guilty and the government filed a §5K1.1 motion for a downward departure in sentencing. The defendant was sentenced on or about July 10, 1992. At that time a Presentence Report had been completed and filed and the sentencing judge sentenced the defendant to 144 months confinement in federal prison. In settling on this sentence, the sentencing court adopted the factual statements contained in the Report, particularly those in the "offense conduct" section.

The court arrived at an offense level of 40 by determining that the defendant had discussed and, therefore, intended to deliver 15 tons of marijuana from Mexico, 500 kilograms of cocaine from Guatemala, 591 kilograms of cocaine from Mexico, and was involved in a marijuana reverse buy, involving 1,000 pounds of marijuana in Houston, Texas. The probation

officer, pursuant to U.S.S.G. §2D1.4, converted the 1091 kilograms of cocaine into the equivalent kilograms of marijuana. (232,261.6 kilograms).

Having established the marijuana equivalency, the probation officer concluded that the offense level of 40 was appropriate because the amount of marijuana involved was at least 100,000 kilograms but less than 300,000 kilograms. The probation officer determined that the defendant played an aggravating role and, pursuant to U.S.S.G. §3B1.1(c), increased the defendant's offense level by two (2) resulting in an adjusted offense level of 42. This offense level permitted the court to sentence the defendant between 360 months and life confinement.

When the defendant appeared for sentencing, the court, in accordance with the government's motion for a departure pursuant to U.S.S.G. §5K1.1 sentencing, sentenced the defendant to 144 months confinement, essentially sentencing the defendant at offense levels 32 or 33. *(Levels 32 and 33 together permit sentencing between 121 and 168 months).*

On September 2, 1992, the government caused a second indictment to be returned against the defendant wherein the defendant is charged with conspiracy to import cocaine into the United States (Count 1) and aiding and abetting the attempt to import cocaine into the United States (Count 2). It

is this indictment that is the subject of this motion.

Contentions:

The government contends that the charges of conspiracy to import cocaine and aiding and abetting charged in this case are separate and distinct offenses from the conspiracy and aiding and abetting the possession with intent to distribute marijuana charges filed in cause number H-91-33. The government points out that the evidence concerning the cocaine offenses occurred between August 18, 1989, and August 15, 1990, some seven (7) months prior to the marijuana offenses. Therefore, double jeopardy does not apply.

The government also contends that, because the sentence on the marijuana conviction must be served concurrently with any sentence on a cocaine conviction, the defendant suffers no harm.

The defendant contends that jeopardy attached when the defendant was sentenced based upon consideration of offense conduct that occurred in 1989 and 1990. The defendant contends that, because his punishment, including the §5K1.1 downward departure, exceeded the maximum punishment that the defendant could have been sentenced to had he been sentenced only on the marijuana offense, the plea agreement is breached by this current

indictment.

Discussion:

The two components of the double jeopardy principle provide protection against a subsequent prosecution for the same offense and against multiple punishments. See *Grady v. Corbin*, 495 U.S. 588 (1990); see also *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991).

In the case at bar, the Court focuses only on the second prong of the double jeopardy protection. In this vein, *Ball v. United States*, 470 U.S. 856 (1985), is instructive. In *Ball*, the Court held that the Congress, in enacting the Sentencing Guidelines, did not intend to punish the same offense under two separate statutes: (the sentencing guidelines vs. the criminal statutes). The guidelines support this observation. Under §3D1.1(a), the "Procedure for Determining Offense Level on Multiple Counts", the guidelines provide that:

> "[W]hen a defendant has been convicted of more than one count, the court shall:
>
> (1) Group the Counts resulting in conviction into distinct Groups of Closely-Related Counts ('Groups') by applying the rules specified in §3D1.2.

Section 3D1.2 speaks to the circumstance where the same victim is involved in two or more acts or transactions by a common criminal objective or constituting part of a common scheme or plan. The fact that offenses occur

at different times or that offenses may involve different types of drug activity is of no moment. (See Commentary U.S.S.G §3D1.2). Moreover, even if the criminal objective or scheme constitutes or is composed of legally distinct offenses occurring at different times, the teachings of *Ball* still apply.

The circuit court in *Koonce* expressed the same view. 945 F.2d 1145. Koonce was charged with one count of distributing an unspecified amount of methamphetamine. When the trial court calculated the sentence, it considered other methamphetamine seized at the defendant's residence as well as a quantity sold to a co-defendant. The Court sentenced Koonce after considering all of the methamphetamine identified.

Later, the government decided to prosecute Koonce on the methamphetamine seized at the defendant's home. There as here, the government argued separate and distinct crimes, and no harm in the concurrent sentencing scheme. In rejecting the arguments, the circuit court concluded that the trial court had aggregated Koonce's related crimes and conduct, prior and subsequent, in computing the base offense level and had sentenced him accordingly. Thus, the circuit court concluded that a subsequent punishment would violate the double jeopardy clause of the federal Constitution.

That reasoning and conclusion apply in the case at bar. The government cannot be permitted to craft or develop a scheme by which a person may be twice punished. See *Koonce*, 945 F.2d 1145. This limitation is for a good reason. The government, with its awesome power, gets to choose the crime(s) for which a citizen may be prosecuted. For example, in this case, the marijuana charge resulted from a marijuana reverse buy. Readily, one can see that the government could orchestrate any number of individual drug transactions over a period of months or years and charge each transaction as a separate violation. Certainly, the government should be permitted to decide from which well it draws the poison, but it cannot then declare successive draws as constituting different poisons.

The findings of the sentencing judge in the marijuana conviction show that drug dealings between the defendant and the undercover agents was "reactivated" in June 1990. At that time, the undercover agents wanted both marijuana and cocaine imported into the United States. When a shipment of cocaine was seized in August of 1990, all contact between the undercover agents and the defendant ceased. The activity resumed in January 1991, when an undercover agent contacted the defendant. This contact resulted in the defendant's conviction on the marijuana charge. The sentencing court found

that the June and July 1990, meetings were signi ant and permitted the establishment of the "infrastructure" of the subsequent marijuana conviction. Armed with this evidence, it is no wonder that the sentencing court saw the activity in January of 1991 and June 1990 as a series of transactions constituting one common scheme or plan.

It is this Court's opinion that the prosecution of the defendant on the cocaine conspiracy and substantive count constitutes a violation of the Double Jeopardy Clause of the United States Constitution because it seeks to punish a second time conduct already punished.

The effect of permitting such carving also defeats the spirit and intent of the plea bargaining process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away.

It is ORDERED that the defendant's, Kurt Steven Witte, motion to dismiss is hereby GRANTED.

Signed this 24th day of February, 1993.

KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE